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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

GEORGE ALAN LEWIS,

Petitioner,

v.

JAMES CROSBY, CHARLIE CRIST, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GEORGE ALAN LEWIS,

Petitioner,

vs. Case No.8:99-CV-2564-T-26B

MICHAEL W. MOORE,

Respondent.

_____/

ORDER

Before the Court is a petition for writ of habeas corpus filed by a Florida prisoner pursuant to 28 U.S.C. § 2254 challenging a judgment and sentence rendered by the Sixth Judicial Circuit Court, Pinellas County, Florida.

Background

Following a change of venue from Pinellas County to Polk County, Florida, Petitioner was tried by jury on June 2-14, 1987, and convicted of first-degree murder and sexual battery. The jury recommended a life sentence for the murder. The trial court entered an arrest of judgment on the sexual battery count and, while denying Petitioner's motion for judgment of acquittal and arrest of judgment on the murder count, awarded him a new trial on the charge based on cumulative errors.

The State appealed, contending that the trial court abused its discretion in granting a new trial and arrest of judgment. Petitioner cross-appealed, charging that the trial court erred in not granting a

judgment of acquittal on the murder charge. Finding that there was "substantial competent evidence that was consistent with [Petitioner's] guilt and with any reasonable hypothesis of his innocence," the appellate court denied Petitioner's cross-appeal, reversed the trial court's order on the sexual battery charge, and remanded the case. State v. Lewis, 543 So.2d 769, 769 (Fla. 2d DCA 1989).

On remand, Petitioner was convicted of first degree murder and sexual battery with a deadly weapon. Dkt. 1, Post-Conviction Proceedings, Vol. 1 at 5-6. Petitioner was sentenced to serve a term of life imprisonment on the charge of first degree murder and a term of twelve years imprisonment on the charge of sexual battery with a deadly weapon on June 2, 1989. Dkt. 1 at 2.

Petitioner filed a direct appeal asserting the following grounds for relief:

1. Whether Defendant's involuntary exclusion from portions of the jury selection process denied Defendant his right to due process under the Sixth and Fourteenth Amendments of the United States Constitution;

2. Whether the trial court abused its discretion in admitting into evidence several photographs of the decedent at the crime scene, a video tape of the crime scene prior to removal of decedent's body, and several morgue photographs;

3. Whether the trial court erred in convicting and sentencing Defendant for sexual battery with a deadly weapon when the jury returned a verdict for sexual battery; and

4. Whether defendant was denied his right to a fair trial and due process for the reasons set forth by Defendant in *State v. Lewis,* 543 So.2d at 760.

The appellate court affirmed Petitioner's conviction and sentence on June 8, 1990. His motion for rehearing was denied on September 4, 1990, with the mandate issuing on September 21, 1990. *Lewis v.*

State, 566 So.2d 270 (Fla. 2d DCA 1990). Dkt. 1, Post-Conviction Proceedings, Vol. 1 at 12. The Florida Supreme Court rejected Petitioner's request for discretionary review on March 13, 1991. *See Lewis v. State*, 581 So.2d 165(Fla. 1991).

On March 12, 1993, with the assistance of counsel, Petitioner filed a state application for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 (hereinafter "Rule 3.850"). Dkt. 1, Post-Conviction Proceedings, Vol. 1 at 19-26. Therein, Petitioner alleged that the prosecution withheld impeachment material and exculpatory evidence; the state attorney's office and the Gulfport Police Department withheld public records; and newly discovered evidence warranted granting him a new trial. The trial judge recused himself from the Rule 3.850 proceedings, and the parties stipulated to the reassignment of the case to the chief circuit judge for consideration of Petitioner's motion. Dkt. 18, Ex. 3.

Concluding that many of the allegations contained in the Rule 3.850 motion lacked merit, the trial court denied relief on all but six of Petitioner's claims in a pre-evidentiary hearing order entered on November 27, 1995. Dkt. 1, Post-Conviction Proceedings, Vol.13 at 1931. Following a four-day evidentiary . hearing on the remaining claims, the trial court entered a thorough and well-reasoned twenty-five (25) page order on September 26,1996, finding that Petitioner had failed to demonstrate that he was entitled to post-conviction relief on the following claims:

1. The State suppressed a sworn statement taken from Maureen Byrnes by two prosecutors on July 19, 1984;

2. The State suppressed a letter dated September 7, 1984, written by Mackey and sent to Tosi;

3. The State suppressed a memorandum dated September 18, 1985, which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis;

4. The State concealed all but the first two pages of a

22-page Supplemental Report of Detective Brinkworth containing interviews with Byrnes, Kilpatrick, Mackey, and Kumble;

5. The State suppressed evidence concerning suspect Steven Louis Fischler which included an investigative report; and

6. The State concealed an incriminating statement made by suspect Steven Louis Fischler.

Dkt. 1, Post-Conviction Proceedings, Vol. 13 at 1932.

The trial court rejected Petitioner's *Brady* claims as lacking merit based on the Supreme Court's holdings in *Brady v. Maryland,* 373 U.S. 83 (1963), and its explication of the *Brady* rule in *United States v. Bagley,* 473 U.S. 667 (1985) and *Kyles v. Whitley,* 514U.S. 419 (1995). Dkt. 18, Ex. 4. On August 7, 1998, the appellate court issued a written opinion affirming the trial court's decision denying Petitioner's motion for post-conviction relief in which it stated that "although favorable information was withheld from Lewis, it did not have the probability of changing the outcome of his trial." *Lewis v. State,* 714 So.2d 1201, 1203 (Fla. 2d DCA 1998). Dkt. 18, Ex. 7. The Florida Supreme Court denied Petitioner's request for discretionary review on November 25, 1998. *Lewis v. State,* 728 So. 2d 203 (Fla. 1998).

Petitioner filed the instant petition on November 8, 1999, raising six *Brady* claims and one *Giglio*[1] claim asserted in his Rule 3.850 motion. For reasons set forth *infra,* the Court finds that Petitioner has not demonstrated that he is entitled to federal habeas relief.

Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), signed into law on April 24, 1996, amended the statutes governing federal habeas relief for state prisoners. Although Petitioner was convicted in 1989, because he filed his petition after AEDPA's enactment, its provisions are applicable to his

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[1] ***Giglio v. United States, 405 U.S. 150 (1972).***

petition. *See Wilcox v. Florida Dep't of Corrs.*, 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied,* 531 U.S. 840 (2000). Where a state court initially considers the issues raised in the petition and enters a decision on the merits, 28 U.S.C. § 2254(d) governs the review of those claims. *See Mobley v. Head,* 267 F.3d 1312, 1316 (11th Cir. 2001), *cert. denied,* U.S. ,122 .Ct. 2682, 153 L.Ed.2d 853 (2002) (finding that the court must deny the writ unless one of two § 2254(d)exceptions applies).

The new § 2254 creates a deferential standard for federal court review of state court adjudications. In pertinent part, § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Eleventh Circuit interpreted the new standard in Putman v. Head:

> The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions. See *Williams v. Taylor,* 529 U.S. 362, 404-05, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000). A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forthby Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a

Supreme Court case. *See Bottoson v. Moore,* 234 F.3d 526, 531 (11th Cir. 2000).

> A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. *See id.* An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. *See id.* Notably, an "unreasonable application" is an "objectively unreasonable" application. *See Williams,* 529U.S. at 412, 120 S.Ct. at 1523.
>
> Lastly, § 2254(d)(1) provides a measuring stick for federal habeas courts reviewing state court decisions. That measuring stick is "clearly established Federal law." 28 U.S.C. § 2254(d). Clearly established federal law is *not* the case law of the lower federal courts, including this Court. Instead, in the habeas context, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Williams,* 529 U.S. at 412, 120 S.Ct. at 1523.

268 F. 3d 1223, 1241 (11 th Cir. 2001) (footnotes omitted).

Because a state court initially considered the issues raised in the petition and entered a decision on the merits, § 2254(d) governs the review of Petitioner's claims. See *Mobley,* 267 F.3d at 1316. In a recent decision addressing the level of deference which should be accorded a state court decision under § 2254(d), the Supreme Court stated:

> A federal court's collateral review of a state court decision must be consistent with the respect due state courts in our federal system. . . . [however], deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 2003 WL 431659, at *12 (U.S. Feb. 25, 2003).

A petitioner has the burden of overcoming all state court factual determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

Evidentiary Hearing

The Court has carefully reviewed the record and concludes Petitioner is not entitled to an evidentiary hearing. *Smith v. Singletary, 170* F.3d 1051, 1053-54 (11th Cir. 1999). The pertinent facts of the case are fully developed in the record before the Court. *Cave v. Singletary,* 971 F.2d 1513, 1516 (11th Cir. 1992). Thus, no additional evidentiary proceedings are required. *High v. Head,* 209 F.3d 1257, 1263 (11th Cir. 2000), *cert. denied,* 532 U.S. 909 (2001) (citing *McCleskey v. Zant,* 499 U.S. 467, 494 (1991)).

Discussion

After his direct appeal was concluded, Petitioner submitted a request for public records to the Gulfport Police Department and the Florida state attorney's office, Sixth Judicial Circuit, Pinellas County, Florida. Material he received in response to his request revealed the existence of several case-related documents which were not previously disclosed to him. In his petition, Petitioner asserts that the State's failure to provide him copies of said documents and prosecutorial misconduct warrant granting him federal habeas relief. Petitioner makes the following assertions in support of his petition:

> The trial court misread the facts, failed to evaluate the suppressed evidence collectively, erroneously engaged in a sufficiency of the evidence analysis, and applied the wrong standards for determining materiality. The result is a decision that is contrary to and involved an unreasonable application of clearly established decisions of the Supreme Court of the United States

> and a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, thereby entitling the petitioner to relief under 28 [sic] U.S.C. § 2254(d)(1) and/or (d)(2).

Dkt. 14 at 40.

Respondent argues, to the contrary, that under the provisions of § 2254(d), Petitioner is not entitled to federal habeas relief. Respondent contends that Petitioner had an opportunity to fully develop the factual basis for his claim during his post-conviction proceedings and was afforded an opportunity to present evidence on his behalf in support of his *Brady* claims during a full and fair evidentiary hearing. Respondent also argues that Petitioner failed to exhaust his claim that the trial court erred in reaching its findings in his post-conviction proceedings. The Court finds that Respondent's exhaustion argument lacks merit. Petitioner's claim that the trial court's findings are erroneous was exhausted when it was presented to the state appellate court.

Having reviewed the record, the arguments presented by the parties in their briefs, applicable statutes and controlling case law, the Court finds that Petitioner's claims lack merit. The trial court held a four-day evidentiary hearing and thereafter entered a thorough and well-reasoned, twenty-five page order finding that Petitioner had failed to demonstrate that he was entitled to post-conviction relief on these claims.

Six of the claims Petitioner asserts in his federal habeas petition as grounds for relief are based on the Supreme Court's holding in *Brady v. Maryland,* 373 U.S. 83, 87 (1963)(holding that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."). Although the trial court did not specifically address Petitioner's *Giglio* claim in its written order denying his Rule 3.850 motion, the trial court's denial of the motion indicates that it considered and decided the claim adversely to

Petitioner. *See Ogle v. Estelle,* 592 F.2d 1264, 1268 (5th Cir. 1979)[2] (quoting *Smith v. Digman,* 434 U.S. 332, 333 (1978) (finding that "a district court commits plain error in assuming that a habeas petitioner must have failed to raise in the state courts a meritorious claim that he is incarcerated in violation of the Constitution if the state appellate court's opinion contains no reference to the claim."). "[E]ven if the court did not decide the issue, it was afforded a full and fair opportunity to do so in compliance with § 2254." Id.

Brady Claims

As discussed *infra,* the trial court set out the four-prong test enunciated in *Brady* and its progeny, examined each of Petitioner's claims individually, and then collectively, and found that "the State was in possession of certain statements, reports and letters that were not provided to the Defendant [which] are favorable to [him] and ... could not have been obtained by using reasonable diligence." The trial court concluded, nonetheless, that there is not a reasonable probability that another trial would produce a different outcome.

To establish *a Brady* violation, the defendant must show that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense, or exculpatory; (3) the evidence was not in the possession of the defense and could not have been obtained by using reasonable diligence; and (4) the evidence was material. *Brady,* 373 U.S. at 87; *see also United States v. Massey,* 89 F.3d 1433, 1443 (11th Cir. 1996); *United States v. Starrett,* 55 F.3d 1525, 1555 (11th Cir. 1995).The *Brady* rule applies to both exculpatory as well as impeaching evidence. *United States v. Bagley, 473* U.S. 667 (1985). Favorable evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) (citing *Bagley,* 473 U.S. at 682). In other words, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *Id.* at 437. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* at 434 (citing

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[2]Fifth Circuit decisions handed down prior to October 1, 1981, are binding precedent upon this Court. See *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Bagley, 473 U.S. at 678). In evaluating materiality, suppressed evidence must be evaluated collectively. *Id.* at 436; *McMillian v. Johnson,* 88 F.3d 1554, 1567 (11th Cir. 1996).

"The Government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *United States v. Meros,* 866 F.2d 1304, 1309, *cert. denied,* 493 U.S. 932 (1989) (quoting *United States v. Valera,* 845 F.2d 912, 927-28 (11th Cir. 1988)). Thus, matters known to the defense are not matters within the parameters of the *Brady* decision. Likewise, a matter is not suppressible for *Brady* purposes if the defense had access to it. *Halliwell v. Strickland,* 747 F.2d 607 (11th Cir. 1984), *cert. denied,* 472 U.S. 1011 (1985). Finally, a Brady violation is subject to a harmless error analysis. *Strickler v. Greene,* 527 U.S. 263 (1999) (finding that the failure of the prosecution to disclose an investigator's notes and letters relating to witness interviews which would have been useful for impeachment is subject to harmless error analysis and does not assure a right to relief under *Brady).*

Petitioner's defense was that someone other than himself had committed the crimes with which he was charged. The crux of the petition is that had Petitioner had the information withheld by the State, he would have been able to effectively impeach the testimony of Peter Kumble (hereinafter "Kumble") and establish that the State had "bungled" the investigation.

Claim One

In his first claim for relief, Petitioner asserts that the State suppressed "a sworn statement taken from Maureen Byrnes by two prosecutors on July 19, 1984," which would have been useful for impeachment of Kumble. Dkt. 14 at 52-53. In a sworn statement given to the state attorney, Ms. Byrnes said that Kumble told her that the victim had been "raped and murdered" before the police released that information to the public. Petitioner asserts that he would have used this information to establish that Kumble was a viable suspect for the murder. When Petitioner raised this issue during his state post-conviction proceedings, the trial court found as follows:

> There is no doubt this statement was in possession of the state. It was taken by two assistant state

> attorneys on July 19, 1984, and transcribed on August 5, 1984. In this statement, Ms. Byrnes says unequivocally that when Mr. Kumble called her on Thursday night, after he talked on the phone to Detective Brinkworth, he told her Karen Gregory had been raped and killed.(Exhibit 11, p. 11) (emphasis in original).
>
> At the Evidentiary Hearing, Ms. Byrnes admits she used the term raped and murdered in her sworn statement, but says she doesn't know if Kumble actually used the words raped and murdered or if she was trying to be helpful and relying on information she had heard or learned over time since the murder. She says she actually had these doubts at the time she gave her statement, but was unsure if she was allowed to contradict what she had just said. (Byrnes, 3.850 Hearing, pages unknown). She further says on cross examination that she is sure Kumble said Ms. Gregory had been "murdered",but is not sure he said "raped." She also says she is sure she knew from some source, prior to her statement, that Ms. Gregory had been raped as well as murdered. (Byrnes, 3.850 Hearing, pages unknown).
>
> The state clearly should have turned over the Byrnes statement to the defense, . . . The admissibility of the Byrnes statement is entirely different, however.

Dkt. 18, Ex. 4 at 7-9. Finding Ms. Byrnes' sworn statement "an evidentiary nightmare," the trial court concluded that the statement did not meet the *Brady* test because it would have been inadmissible as substantive evidence in the trial or for impeachment purposes given Ms. Byrnes' testimony during the Rule 3.850 evidentiary hearing that at the time she gave the statement she did not know if Kumble actually used the words "raped and murdered or if she was trying to be helpful and relying on information she had heard or learned over time since the murder." Dkt. 18, Ex. 4 at 8.

Also lacking merit is Petitioner's argument that the trial court erred in finding that the statement was not material because it was inadmissible under the Florida Evidence Code. Petitioner argues that inadmissible evidence is material under *Brady* if it would have a direct impact upon the preparation and investigation of the defense. In

addressing this issue, the Eleventh Circuit held as follows:

> Furthermore, it is clear that the Florida Supreme Court did not unreasonably apply the *Brady* standard when it found that this inadmissible evidence was not material. *Brady's* materiality standard defines evidence as "material" only if there is a reasonable probability that its disclosure would have affected the outcome of the proceeding. *Bagley, 473* U.S. at 682, 105 S.Ct. 3375. Inadmissible evidence could only rarely meet this standard – indeed, no Supreme Court case, either before or since the Florida Supreme Court's decision in *Breedlove II,* has found inadmissible evidence was material for *Brady* purposes. In light of this fact, it was certainly not objectively unreasonable for the Florida Supreme Court to assume that inadmissible evidence, such as the evidence at issue in *Breedlove 11,* was not material under the standard articulated in *Bagley.*

Breedlove v. Moore, 279 F.3d 952, 963-64 (11thCir. 2002), *cert denied,* 2003 WL 397962 (U.S.) (footnotes omitted). See also *Delap v. Dugger,* 890 F.2d 285, 298 (11th Cir. 1989) (finding that evidence of unrelated illegal activity by a police officer testifying for the state would likely not have been admissible under Florida's law of evidence, and thus immaterial for *Brady* purposes). The trial court's decision that the allegedly suppressed evidence was inadmissible was completely consistent with Florida evidentiary law in 1987, and cannot be disturbed by this Court. *Breedlove,* 279 F.3d at 964.

The trial court properly identified the Brady standard and analyzed this claim applying the standard as explicated by the Supreme Court in *Bagley and Kyles.* Its decision is not contrary to or an unreasonable application of federal law or an unreasonable application ofthe facts in light of the evidence presented.

Claim Two

In claim two, Petitioner asserts that the State suppressed "a letter dated September7, 1984, written by Mackey and sent to Tosi" which could have been used to impeach Kumble and to support the defense's claim that the State had been pressured into charging Petitioner. Dkt. 14 at 20. In addressing this claim, the trial court stated:

> This letter should have been given to the defense in its

entirety as discovery, whether it contains *Brady* information or not.

> ...
>
> The fact that David Mackey exerted pressure on the police to solve this case was well known to the defense. (Mackey deposition, pp. 97 -111). They used this pressure at trial to the Defendant's advantage. The defense was well aware that Kumble was a suspect and exploited this fact at trial. (R. 4120 - 4124, e.g.). The real *Brady* information in the letter is the information, not known to the defense, that Marie Byrnes had indicated Kumble had told her Karen Gregory was raped and murdered immediately after talking on the phone to Detective Brinkworth. Mackey, of course, could not testify regarding this, as it would be hearsay.
>
> Therefore, although the state should have provided this Mackey letter in discovery, it is not a *Brady* violation that will bring the Defendant any relief.

Dkt. 18, Ex. 4 at 10. As stated *supra,* issues raised by the Byrnes statement were addressed by the trial court in its finding that the statement did not meet the *Brady* test. The trial court's finding that this claim is likewise without merit is not contrary to or an unreasonable application of federal law or an unreasonable application of the law to the facts. *See* 28 U.S.C. § 2254(d). Petitioner has also failed to overcome the presumption of correctness accorded trial court findings of fact pursuant to 28 U.S.C. § 2254(e).

Claim Three

In this claim, Petitioner asserts that "[t]he State suppressed a memorandum dated September 18, 1985, which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis." Dkt. 14 at 21. According to Petitioner, he would have used this information to support his claim the State had "bungled" the investigation, preventing him from having access to evidence which might support his claim that someone other than himself was present in the house on the night of the murder. *Id.* In

addressing Petitioner's contaminated evidence claim, the trial court found as follows:

> Since much of the Defendant's strategy at trial centered around the "bungled investigation" defense, this information was favorable to the Defendant, and would presumably have been explored in the trial by defense counsel had they been made aware of it.
>
> The state should have revealed this and failure to do so is a *Brady* violation.
>
> The defense would have pursued the fact that four bags of debris gathered from a pair of shorts, a pillow case, a sheet, and a mattress pad were not examined because Detective Tosi had opened the bags prior to their re-submission to Technician Hensley. This would be admissible testimony. They would then add this additional "bungling" to the other examples they use in their closing argument... .
>
> This would be proper closing argument. However, it is dangerous. The defense can and did make much ado about no hairs and fibers of George Lewis being found at the scene of the crime. . . . Since these items were bedroom items, not located where George Lewis says he went that night, it would seem allowing the jury to speculate as to whose hairs might be in those bags -- Kumble's or those of George Lewis -- might inure to the benefit of the state.

Dkt. 18, Ex. 4 at 11-12; 18-19.

As the trial court noted in its decision denying Petitioner's Rule 3.850 motion, he asserted his "bungled investigation" defense throughout the trial, and during closing, he reinforced his argument that the investigation was not conducted properly by citing numerous alleged examples of a contaminated crime scene, missing evidence, and oversights and mistakes by investigators and members of the forensic team for the jury's consideration. *See, e.g.*, Dkt. 1, Trial Transcripts, Vol. 12 at 4537; 4549; 4553; 4557; 4561;4563; 4565; and

4571. A review of the trial transcript reveals that the trial court's observations are correct. Petitioner actually bolstered his claim of innocence by pointing to the absence of either hair or fiber evidence placing him inside the house at the time the murder occurred. Dkt. 1, Trial Transcripts, Vol. 12 at 4570.

Applying the *Brady* standard and guided by the Supreme Court's decisions in *Kyle* and *Bagley,* the trial court found that disclosure of this information was not material under the standard articulated in *Bagley.* Suppressed information is not material unless there is a "reasonable probability" that had the information been disclosed the result at trial would have been different. *See Wood v. Bartholomew,* 516 U.S. 1, 5 (1995). *See also United States v. Amiel,* 95 F.3d 135, 145 (2d Cir. 1996) (finding that "[s]uppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." (internal quotation omitted)). The trial court correctly found that no reasonable probability exists that the disclosure of this evidence would have affected the outcome of Petitioner's trial. Petitioner has again failed to overcome the burden imposed by 28 U.S.C. § 2254(d)-(e). This Court finds, therefore, that this claim lacks merit.

Claim Four

In this claim, Petitioner asserts that "[t]he State concealed all but the first two pages of a 22-page Supplemental Report of Detective Brinkworth (See Dkt. 1, Post-Conviction Proceedings, Vol. 2 at 100) containing interviews with Kilpatrick, Mackey, and Kumble" which Petitioner asserts could have been used to impeach Kumble. Dkt. 14 at 21; 56-59. According to Petitioner, the suppressed report contained information regarding Kumble's alleged romantic interest in the victim, *id.* at 21, Kumble's activities the night the murder occurred, *id.* at 22, statements he made to Detective Brinkworth regarding the reason for his visit to the house on the evening following the murder, *id.* at 23, and observations he made during the visit, *id.* at 23-24. In addressing this claim, the trial court made the following findings:

> Exhibit 6 was in the possession of the State Attorney's Office. It was not provided to the defense, except for pages 1 and 2 which were given to the defense during

> the trial. Some of the matters contained in the report may have been favorable to the Defendant, ... Some of the information contained in Exhibit 6 was not in the possession of the Defendant, and could not have been obtained by the use of reasonable diligence by his lawyers.
>
> Both the state and defense concede that written reports containing material impeachment of material witnesses are *Brady* information and must be turned over to the defense.

Dkt. 18, Ex. 4 at 2. The trial court correctly examined each claimed violation under the *Brady* standard, before concluding that the claims lacked merit.

In addressing Petitioner's allegation that the report could have been used to impeach Kumble's testimony regarding his alleged "romantic interest" in the victim, the trial court found that:

> Detective Brinkworth told the defense about Ms. Byrnes' statement. (Brinkworth deposition, pp. 34 and 36). He also told them Kilpatrick had indicated Kumble had an interest in Ms. Gregory. (Brinkworth deposition, p.19 and 27). The defense had a great deal of information about Mr. Mackey's and Ms. Kilpatrick's (and even Ms. Gregory's) thoughts on this matter. (Mackey deposition pp. 31, 35 - 36, 38 - 39, 41, 43, and 45). The defense knew Mr. Kumble had walked on the beach with Ms. Gregory the night after she and Mackey had broken up. (Ciarciaglino testimony, 3.850 hearing, pages unknown). They also knew that despite what Kumble said, he and Byrnes had broken up prior to the homicide. (Brinkworth deposition, p. 36).
>
> ...
>
> This court finds, therefore, this purported *Brady* information was either known to or reasonably could have been obtained by the defense using reasonable

diligence and, therefore, this is not a *Brady* violation.

Dkt. 18, Ex. 4 at 3-4. This finding is consistent with federal law. *See Meros,* 866 F.2d at1309.

The trial court then addressed statements contained in Detective Brinkworth's report regarding Kumble's "alibi," finding as follows:

> There is nothing in Exhibit 6 that the defense did not know at the time of the first trial regarding [Kumble's] "alibi." . . . . There is no favorable *Brady* information here. When a person is asked to relate what he did on a given day/night, he is not going to relate what he didn't do unless asked. When asked by Brinkworth if he attended his yoga class, he readily admitted he did not and gave an explanation of why he did not. (Exhibit 6, p. 16). He was never asked by Brinkworth about the canceled concert. There is no *Brady* violation here.

The purpose of the decision in *Brady is* to insure that defendants constitutional rights arenot violated by governmental abuses of the discovery process. Where there was no information withheld from the defendant, there can be no *Brady* violation.

Petitioner also asserted that failure to produce the Brinkworth report constituted a *Brady* violation because references were made in the report to Kumble's explanation of his activities on the night in question, particularly regarding a visit to the victim's home. In assessing this claim, the trial court found as follows:

> The defense claims Kumble related different versions of the events when he went by the victim's house, the night after the murder.
>
> The first version, they claim, was on the note, where Kumble makes no mention of dinner. The defense had the note, so this is not a *Brady* claim.
>
> The second version, they claim, is in the Brinkworth

> report where Kumble calls when the body is found and tells Brinkworth that he was at the Mackey residence on Wednesday and was there to have dinner and return a tape. . .. [It couldn't be used to impeach Kumble, who testified in his deposition that his purpose in going to the Mackey house on Wednesday was both to have dinner and to return a tape. (Kumble deposition, 1, p. 28). If Kumble testified differently at trial, he could easily have been impeached from his own deposition. This does not provide *a Brady* claim. Additionally, all this information is in the first two pages of the Brinkworth report which was given to the defense at trial. They could have used it for whatever worth it was to them during the trial. Since they had it, albeit late, it cannot now be the basisof a *Brady* claim.

Dkt. 18, Ex. 4 at 4-5. Again, this is consistent with federal law under *Brady*. *See Meros,* 866 F.2d at 1309.

The trial court also correctly found that "the defense claims that Kumble's deposition and trial testimony regarding what he said to Brinkworth over the phone differed" were without merit because "the defense had . . . the Kumble deposition and were at the trial. . . This cannot be the basis of a *Brady* claim." Dkt. 18, Ex. 4 at 5. The trial court's decisionis consistent with federal law. *See Meros,* 866 F.2d at 1309.

Addressing Petitioner's assertion that if he "had had the Byrnes statement (Defendant's Exhibit 12), [Petitioner] could have shown that Kumble didn't tell her in his call to her that he had gone to the Mackey house for dinner, but only to return the tape," the trial court found that the claim was without merit:

> The last portion of the defense argument regarding Kumble's planned activities with the victim on May 23rd deals with differences in the deposition testimony and trial testimony of Mr. Kumble. They had the deposition and heard the trial testimony. They could have impeached him had they chosen to do so. This is not a *Brady* violation.

Dkt. 18, Ex. 4 at 6.

The trial court found that the fact that during a discussion with Brinkworth after returning from vacation, Kumble "forgot to mention the dinner plans until reminded is similar to the same

omission on the note,[3] which the defense did have and used at trial." Dkt. 18,Ex. 4 at 3-4.

Finding Detective Brinkworth's deposition "full of inaccuracies regarding his interview with Mr. Kumble on June 12, 1984," the trial court concluded that "[h]is report of that interview should therefore have been given to the defense. However, once again, had the defense had this report, it could
have been used principally to impeach Brinkworth, not Kumble. Since the state never got into this interview, the rules of evidence in existence at the time of the trial (1987) would not have allowed the defense to call Brinkworth and then impeach him."

When law enforcement personnel arrived at the crime scene, they discovered that glass panels were broken in the jalousie door, and there was glass on the walkway leading away from the house toward the street. Kumble testified that he did not "recall" seeing anyglass on the ground outside the door to the victim's house on the night he went there for dinner and discovered that nobody was at home. Dkt. 1, Trial Transcript, Vol. 8 at 3784. During his initial interview, however, Kumble told Detectives Brinkworth and Reed that he did see broken glass. Dkt. 18, Ex. 5 at 116. *See* Dkt. 1, Post-Conviction Proceedings, Vol.4 at 537.

The trial court found that there was an inconsistency as to whether or not Kumble saw the glass. According to Kumble's trial testimony and the depositions of Detective Brinkworth and Kumble, at the time he visited the house he sees no glass. The Brinkworth report (Exhibit 6) clearly indicates that Kumble not only saw glass, but further thought the Mackey house seemed 'out of character' having broken glass when it was so well kept other than that." Dkt. 18, Ex. 4 at 6. The trial court found, however, that the defense "could have impeached Kumble with the testimony of either Detective Reed or Morey Bornstein, who was Kumble's attorney . . . . Kumble was willing to waive the attorney/client privilege.... Mr. Bornstein's notes appear to suggest that his client indicated in the interview he had seen glass." Dkt. 18, Ex. 4 at 7 (citation omitted). Testimony by

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[3]Kumble left a note on the windshield of one of the two vehicles parked in the driveway at the victim's house the night he arrived for dinner and found nobody at home.

Petitioner's trial attorney confirms that he had a copy of Mr. Bornstein's notes and was aware of the reference to glass in the notes, but found the statement "ambiguous." Dkt. 1, Post-Conviction Proceedings, Vol. 20 at 3044-45.

Next, Petitioner asserted that what Detective Brinkworth said to Kumble regarding the victim's death during their telephone conversation the night the body was discovered was material when considered in conjunction with Ms. Byrnes' statement regarding Kumble's report to her that the victim was "raped and murdered" before that information was made public. The trial court found that "[t]here is no dispute that the defense was given the first two pages of Brinkworth's report....Even though the word 'untimely' does not appear in his report, it does appear he told Kumble he was there on an 'investigation reference the death of Karen Gregory.' Since the defense had the two pages of the report, albeit late, there is no *Brady* claim." Dkt. 18, Ex. 4 at 7. See *Meros,* 866 F.2d at 1309.

The trial court also found that "the fact that Kumble failed to explain his whole evening's activities to Detective Brinkworth during that conversation, or even later until being reminded by Brinkworth is of little note. When asked, he readily admitted he had had dinner with Ms. Byrnes that evening and had called her after he had talked to the police when he called the Mackey residence and learned that Karen was dead. This was well known to the defense, and thus cannot be the basis of a *Brady* claim." Dkt. 18, Ex. 4 at 6-7. See *Meros,* 866 F.2d at 1309.

Petitioner adopted a strategy for his defense. The fact that the jury was not persuaded by trial counsel's arguments does not render his conviction unconstitutional. This is not a case in which the prosecution depended "almost entirely on the testimony of one witness, without whom there would be no indictment or evidence to carry the case to the jury." *See Kelley v. Singletary,* 222 F.Supp. 1357, 1364 (S.D. Fla. 2002) (withheld report was material because it revealed co-defendant's agreement to testify *if* he could begranted immunity from prosecution) (emphasis in original).

The trial court's finding is not contrary to or an unreasonable application of clearly established Supreme Court law or an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. 2254(d). Petitioner has also failed to overcome by clear

and convincing evidence the presumption of correctness accorded the trial court's factual findings pursuant to 28 U.S.C. § 2254(e). Thus, the trial court's decision that this claim is without merit must stand.

Claims Five and Six

Both of these claims relate to the investigation of one of the victim's co-workers, Steven Louis Fischler (hereinafter "Fischler"), as a suspect. Following the murder, a schematic drawing belonging to Fischler was found inside the victim's home. Petitioner asserts that the State failed to disclose an investigative report which named Fischler as a possible suspect (Dkt. 14 at 24) and a statement made by Fischler during a polygraph examination (Dkt. 14 at 25).

During the early stages of the investigation, the police interviewed Fischler, gave him a polygraph examination, obtained his prints and hair samples, and included his photograph in a photo array shown to Petitioner. Fischler was eliminated as a suspect because his hair and prints did not match those found inside the house, the polygraph was inconclusive, and when shown Fischler's photograph, Petitioner stated that he was not the "stranger" Petitioner saw on the victim's lawn shortly after he heard a scream coming from the house on the night of the murder.

During the evidentiary hearing, Former Detective Scott Barnes testified that he was in an adjoining room while Fischler was taking a polygraph test in 1984 and overheard Fischler state to Brentnell, "Okay. I did it." Dkt. 1, Post-Conviction Proceedings, Vol. 17 at2516. Barnes communicated this information to Attorney Paver in 1990. *Id.* at 2510.

After hearing testimony during the evidentiary hearing, the trial court found that the police report documenting information obtained from Fischler's co-workers about their impressions of him and the statement made by Fischler during the polygraph post-test interview stating either "okay, I did it, or "maybe I did it, maybe I didn't" were not disclosed to the defense. The trial court found that this information should have been made available to the defense; but it also found that the defense knew Fischler had been investigated as a suspect and polygraphed and that Petitioner himself had stated that Fischler was not the"stranger" on the lawn.

In its decision, the trial court addressed Petitioner's assertion that Fischler's statement and the investigative notes should not be

barred as hearsay because they would be offered for the fact that this was information the police had but failed to act on, rather than for the "truth" of the matter. The trial court found that it was doubtful whether "any judge would allow into evidence Fischler's hearsay statement or hearsay investigative notes loaded with inadmissible character evidence -- he's 'weird,' gives me the 'creeps,' etc." Dkt.1, Post-Conviction Proceedings, Vol. 2 at 177-78.

A review of the suppressed police report reveals that there is no mention in the report of contact of any nature between Fischler and the victim. *Id.* Petitioner does not argue that suppressed police reports show that Fischler had the motive, or opportunity, or was implicated in the crimes by evidence gathered during the police investigation.

Testimony presented during the evidentiary hearing supports the trial court's conclusion that the statement made to the polygraph examiner was "both preceded and followed by adamant denials, and apparently made facetiously by someone who was 'pissed off' . . .when he made the statement. . . , Fischler didn't believe he was seriously subjecting himself to criminal liability when he made it, nor do the circumstances surrounding his statement suggest he 'believed it to be true.'" Dkt. 18, Ex. 4 at 19. The trial court's decision is supported by both federal and state law. *See Chambers v. Mississippi,* 410 U.S. 284 (1973); *Sliney v. State,* 699 So.2d 662, 670 (Fla. 1997) (affirming trial court's decision to preclude testimony of inmates incarcerated with nontestifying co-participant in robbery during which capital murder occurred because it was not sufficiently trustworthy). Finally, Petitioner has not shown any tangible evidence of a connection between Fischler and the murder for which Petitioner was convicted.

"The crucial inquiry is whether there is evidence in the record that establishes a 'reasonable probability' that the production of the inadmissible evidence would have resulted in a different outcome at trial." *Wright v. Hopper,* 169 F.3d 695, 703-04 & n.1 (11th Cir. 1999).

> [F]or prejudice to exist, we must find that the evidence--although itself inadmissible--would have led the defense to some admissible evidence. *See Bradley v. Nagle,* 212 F.3d 559, 567 (11th Cir.2000). Petitioner never has

> pointed out what admissible impeachment or exculpatory evidence would have been discovered if these documents had been turned over. "A court cannot speculate as to what evidence the defense might have found if the information had been disclosed." *Wright v. Hopper,* 169 F.3d 695, 703 (11thCir.1999). We conclude that the prosecutor's notes of witness statements could not have led the defense to impeachment or exculpatory evidence.

Williams v. Moore, 222 F.3d 1177, 1183 (11thCir. 2000), *cert. denied,* 534 U.S. 903 (2001). As in *Williams,* Petitioner failed to show that the inadmissible evidence would have led to admissible evidence.

The trial court examined each of Petitioner's claims both individually and collectively in arriving at its decision that there was no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "[S]trictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler,* 527 U.S. at 281 (citation omitted); *see also Kyles,* 514 U.S. at 434, 436; *McMillian, 88* F.3d at 1567.

In analyzing Petitioner's *Brady* claims, the trial court applied the test enunciated in clearly established federal law as determined by the Supreme Court of the United States. "In the post AEDPA era, [federal habeas courts] do not conduct an independent review of claims that have been addressed on the merits by the state courts." *Breedlove v. Moore*, 279 F.3d 952 (11thCir. 2002). Having carefully reviewed the record in this case, the Court finds that the trial court's adjudication of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Neither is the decision based on an unreasonable determination of the facts in light of the evidence presented in the statecourt proceedings. *See* 28 U.S.C. §2254(d). Petitioner is not entitled to federal habeas relief on this claim.

***Giglio* Claims**

Petitioner claims that there is a "reasonable likelihood" that the verdict was affectedby "the bad faith objection by the prosecutor that there was no evidence to support an accusation against Kumble;

the false testimony that only the petitioner, and not Kumble, made inconsistent statements; and the false and uncorrected testimony that there was no impropriety with regard to evidence collected from the scene for analysis." Dkt. 14 at 49.Petitioner cites *Brady v. Maryland,* 373 U.S. 83 (1963) ; *Giglio v. United States,* 405 U.S. 150 (1972); *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir. 1995)), *cert. denied,* 531 U.S. 861 (2000); *United States v. Arnold,* 117 F.3d 1308 (11th Cir. 1997); *and DeMarco v. United States,* 928 F.2d 1074, 1076 (11th Cir. 1991), in support of his assertion that he is entitled to a "more relaxed materiality standard because the prosecution's case included perjured testimony, or at the very least, testimony which the prosecution knew was false and failed to correct." In this circuit, the materiality standard set out in *Brady is* applicable to the evaluation of materiality in a *Giglio* claim. *See United States v. Dickerson,* 248 F.3d 1036,1042 (2001) (citation omitted). "The materiality element is satisfied if the false testimony "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 1041.

Bad Faith Objection

Petitioner asserts that the prosecutor acted in bad faith by objecting to a question trial counsel propounded to Kumble. This claim is lacking an essential element for a *Giglio* claim — false testimony. The crux of the claim is an allegation of prosecutorial misconduct. The first step in examining the claim must be to place the comment in context. See *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974) (finding that examination of the entire proceedings in the case did not support the contention that the "prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process."). The following exchange occurred during the trial:

Defense: Isn't it a fact, sir, that on Tuesday evening, you and Mr. Kuhar were out for the evening and you went by the Mackey residence?

Kumble: No, that's not a fact.

Defense: You stopped there to see Ms. Gregory. You made advances. She became angry with you, and you killed

her.

Kumble: No, sir.

State: Excuse me a second. I want — that's improper for this lawyer to ask a question that he has absolutely no good-faith basis to put that on before this jury. And that's why I want the Court to instruct that jury to disregard that question.

Court: Sustained.

Ladies and Gentlemen, you should disregard the last statement by Counsel.

Defense: May I respond? I have a good-faith belief that — Judge, I'd like to give argument here.

State: I think the lawyer has been permitted to go far enough. I ask that comment also be disregarded by this jury.

Court: Well, I will very candidly say, so we may end this, the lawyers, two lawyers are both getting out of hand.

Dkt. 1, Trial Transcripts, Vol. 8 at 3795.

Without further comment, the jury was removed from the courtroom. Trial counsel then made several motions for a mistrial, one of which was based the prosecutor's statement that he had no good faith basis for the accusation that Kumble committed the murder. Dkt. 1, Trial Transcripts, Vol. 8 at 3795-3805. Trial counsel argued that the comment was a personal attack, and as a result, he no longer had any credibility before the jury. This motion was denied, with the trial court judge noting that a curative instruction had been given, and trial counsel had rebutted the statement in the presence of the jury. Dkt. 1, Trial Transcripts, Vol. 8 at 3804. The trial court also denied trial counsel's request for another curative instruction addressing the objection, stating: "I don't think the comment should have been made

in front of the jury. I don't think the question should have been asked. And, again, two ... wrongs don't make a right. So your motion is denied ... I told them before the jury was taken out to disregard all of you." *Id.* at 3804-05.

The prosecutor's objection was proper under both federal and state law. Counsel is not allowed to ask questions which suggest a certain set of facts in the absence of a goodfaith belief that those facts are true. *See Michelson v. United States,* 335 U.S. 469, 481 (1948) (stating that counsel should not ask "a groundless question to waft an unwarranted innuendo into the jury box."). See *also United States v. Tolliver,* 665 F.2d 1005, 1008 (11th Cir. 1982 (finding that "questions tending to incriminate or degrade a witness [are allowed] only where . . . counsel is in possession of some facts which support the belief that the witness committed the offense or degrading act to which the question relates."); *Carpenter v. State,* 664 So. 2d 1167, 1168-69 (Fla. 4th DCA 1995) (discussing good-faith requirement).

Moreover, the fact Kumble had been a suspect early in the investigation is no basis for an assertion that the prosecutor's objection to trial counsel's question was in bad faith. Under the circumstances, the prosecutor's objection, made with justification, did not so infect the trial with unfairness so as to constitute a denial of due process.

Kumble's Allegedly Inconsistent Statements

Petitioner asserts that the prosecutor presented false testimony or failed to correct testimony known to be false by allowing Detective Tosi's testimony that Kumble did not make inconsistent statements to the investigators to go uncorrected. Petitioner presented this *Giglio* claim in his Rule 3.850 motion and presented argument on the issues raised in the claim during the evidentiary hearing.

As the trial court pointed out, only one of the alleged "inconsistencies" in Kumble's statements was not resolved at the time it was made or immediately upon being brought to Kumble's attention prior to the trial – whether he saw glass on the walkway leading to the victim's house on the night following the murder. Dkt. 18, Ex. 4 at 7. Because this issue was presented to the trial court in Petitioner's Rule 3.850 motion and the trial court denied relief, that decision is entitled to deference pursuant to 28 U.S.C. § 2254(d). The trial court heard argument on this issue before finding that he had failed to demonstrate sufficient materiality to warrant relief on his claims.

Thus, the trial court clearly found that Detective Tosi's

testimony did not constitute *a Giglio* violation. This is consistent with federal law. *Cf. Strickler,* 527 U.S. at 289-92 (finding insufficient materiality even where "[w]ithout a doubt, [witness'] testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting [witness] testimony might have changed the outcome of the trial."). *See also Dickerson,* 248 F.3d at 1042 (reject defendant's *Giglio* challenge because the uncorrected, allegedly perjurious statements did not "undermine confidence in the verdict") (citation omitted). Therefore, Petitioner is not entitled to federal habeas relief on this claim.

Contaminated Evidence

Finally, Petitioner alleges that the prosecution presented "false and uncorrected testimony that there was no impropriety with regard to evidence collected from the scene for analysis." Dkt. 14 at *49.* "Presentation [by the state] of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio, 405 U.S.* at 153. Petitioner does not cite to specific testimony in the record. In his petition, however, Petitioner states that "Linda Hensley, a micro analyst, indicated in her deposition that some evidence was not analyzed. Paver asked her why. Hensley's response suggested that another witness had already matched the evidence to someone (R. *3243).* Neither the attending prosecutor, Andrews, nor Hensley, revealed that the real reason was contamination of the evidence." Dkt. *14* at 31. The Court concludes that Petitioner's claim is based on Hensley's allegedly misleading deposition testimony.

On September 16, 1986, Attorney Andringa prepared a memorandum memorializing a telephone conversation during which Hensley advised her that four of nine bags of evidence collected at the murder scene would not be analyzed because they had been opened by someone prior to receipt by the laboratory and were thus considered "contaminated." Dkt. 1, Post-Conviction Proceedings, Vol. *2* at *212.* The memorandum was not given to the defense during discovery. Respondent argued that the fact that four of the nine bags of evidence were not processed as evidence was not withheld from the defense, and the fact that they were contaminated would not have made a difference in the outcome of the trial.

Trial counsel admits that he knew that only five of the nine bags of evidence were analyzed following the Hensley deposition, but

did not use that information. According to trial counsel, "[Hensley] identified the exhibits that had been submitted by the Gulfport Police Department. She identified further, or purported to, what exhibits were actually examined, and identified some exhibits which were not examined." Dkt. 1, Post-Conviction Proceedings, Vol. 21 at 3236; 3240. Trial counsel then explained that he misunderstood Hensley's deposition testimony, stating that "[h]er explanation, as I understood it, was that either Hanlin had identified them to somebody else. And maybe it was inappropriate then to reexamine them, maybe there wasn't a strong match. But she certainly did not tell me, at any time during the course of that deposition, ... that evidence was contaminated." *Id.* at 3243.

Trial counsel claims that, as he understood Hensley's responses during her deposition, she was stating that she had not processed the evidence because someone had already undertaken that task. *Id.* See Dkt. 1, Post-Conviction Proceedings, Vol. 23 at3887-94. Trial counsel also testified that he did recall asking Hensley if the Florida Department of Law Enforcement would perform an analysis on the four "contaminated" bags if the defense were to make such a request. *Id.* at 3895. Although he was told that the tests would be done upon request, according to trial counsel's testimony, he never requested this service. *Id* at 3896.

In addressing this claim, the trial court stated: "I don't know whether M. Paver wasn't asking good questions or whether [Hensley] didn't understand his questions, but it's hard for me to think she was trying to cover up a 'nothing.' And that's what this is, is a 'nothing.' All the defense gets to use this for is one more piece of bungled-up evidence." Dkt. 1, Post-Conviction Proceedings, Vol. 13 at 1957.

Following the hearing, the trial court concluded that "the combined defenses with all the *Brady* evidence does not undermine this court's confidence in the outcome of the case." Dkt. 18, Ex. 4 at 23. *See Kyles,* 514 U.S. at 437. This is the test for materiality under both *Brady* and *Giglio.* See *Dickerson,* 248 F.3d at 1042.

The trial court heard testimony from ten witnesses during the four-day evidentiary hearing, including three state attorneys, three law enforcement investigators, the polygraph examiner, two defense attorneys, and Kumble's former girlfriend. Applying the correct

standard of review as set out in *Brady* and its progeny, the trial court concluding that Petitioner failed to establish that any of the claims he raised, independently or collectively,"put the whole case in such a different light as to undermine confidence in the verdict." *Strickler,* 527 U.S. at 290 (citation omitted). Thus, the trial court's decision is not contrary to or an unreasonable application of clearly established law as enunciated by the Supreme Court or an unreasonable application of the law to the facts of the case. *See* 28 U.S.C. §2254(d). Petitioner has also failed to establish by clear and convincing evidence that the trial court's factual findings are an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(e). Accordingly, Petitioner's *Giglio* claims lack merit.

Standard Applied

Finally, referring to the trial court's statement in the conclusion of its order that it remained "confident that there is not a reasonable probability that another trial would produce an acquittal for the Defendant" (Dkt. 18, Ex. 4 at 25), Petitioner asserts that the trial court applied the wrong standard in assessing his claims. The Court finds this argument to be without merit. When the trial court's comment is placed in context with the remainder of the order, it is clear that the trial judge applied the appropriate standard in finding that petitioner failed to meet the materiality prong of the *Brady* test.

The trial court recognized that the analysis of Petitioner's claims was governed by *Brady,* and set out the standard for a *Brady* review, as enunciated in *Kyles,* stating "[i]n assessing *Brady* claims, the court must evaluate the cumulative effect of all the suppressed favorable evidence. However, the *Brady* allegations must first be examined individually before they can be collectively considered." Dkt. 18, Ex. 4 at 1-2. *Kyles* does not preclude a court from examining *Brady* claims individually; it merely requires that where there is more than one alleged *Brady* violation, the materiality assessment be based on an examination of the evidence "collectively."

After meticulously setting out the details of each claim and evaluating them to determine whether they met the first three prongs of the *Brady* test, the trial court examined the claims in terms of admissibility. Dkt. 18, Ex. 4 at 14. The trial court set out the admissibility requirement too narrowly for *Brady* purposes, but this

had no effect on the outcome of the Rule 3.850 proceedings because Petitioner failed to demonstrate that "the evidence — although itself inadmissible — would have led the defense to some admissible evidence." *Williams,* 222 F.3d at 1183.

Finally, the trial court "collectively examine[d] the admissible evidence [to] determine if there is a reasonable probability that the outcome of the proceedings would have been different," defining "reasonable probability" "as a probability sufficient to undermine the court's confidence in the outcome of the case." *Id.* at 20. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles, 514* U.S. at 436. The trial court examined the items collectively, concluding that "the combined defenses with all the additional *Brady* evidence does not undermine this court's confidence in the outcome of this case." Dkt. 18, Ex. 4 at23. The Court finds that the trial court followed the requirements set out in this circuit for evaluating *Brady* and *Giglio* claims. *See United States v. Jordan,* 316 F.3d *1215,* 1251-52 (11th Cir. 2003); *Dickerson,* 248 F.3d at 1042. Petitioner's assertion to the contrary is clearly, without merit.

Conclusion

For the foregoing reasons, the Court finds that Petitioner has failed to establish that he is entitled to federal habeas relief. Any claims or arguments not specifically addressed herein are rejected as lacking merit.

ACCORDINGLY, the Court **ORDERS** that:

1.. The Petition for Writ of Habeas Corpus is **DENIED** (Dkt. 1).

2.. The **Clerk** shall enter judgment against Petitioner, terminate all pending motions, and close this case.

ORDERED in Tampa, Florida, on March 31,2003.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

SA:jsh

Copy to: All Parties of Record

SUPPLEMENTAL APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GEORGE ALAN LEWIS,

Petitioner,

-vs- Case No. 8: 99-cv-2564-T-26TBM

MICHAEL W. MOORE and
ROBERT A. BUTTERWORTH,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied.Judgment is entered against Petitioner, George Alan Lewis.

Date: .March 31, 2003

SHERYL L. LOESCH, CLERK

By: A. Guzman, Deputy Clerk

Copies furnished to:

Counsel of Record
Unrepresented Parties